No. 56728-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN THE MATTER OF

Ellen Campion,

Appellant,

v.

Diane Rupert and Fletcher Debely,

Respondents.

BRIEF OF APPELLANT

Robert P. Dickson, WSBA No. 39770
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ASSIGNMENTS OF ERROR

1. The Superior Court erred in permitting the case to proceed to trial before the Confirmation of Joinder was filed.
2. The Superior Court erred in permitting the case to proceed to trial before alternative dispute resolution occurred.
3. The Superior Court erred in denying the Motion to Intervene.
4. The Superior Court erred in its calculation of costs and damages.
5. The Superior Court erred in denying Ms. Campion's Motion for CR 11 Sanctions and Costs and Attorney's Fees Under RCW 4.84.185 against Mr. Debely.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a trial can proceed when the plaintiff fails to file the mandatory Confirmation of Joinder and, as a result, parties were omitted?

2. Whether a trial can proceed when the parties fail to engage in mandatory alternative dispute resolution?
3. Whether the Superior Court erred in denying the Motion to Intervene?
4. Whether the Superior Court erred in its calculation of costs and damages?
5. Whether the Superior Court erred in denying Ms. Campion's Motion for CR 11 Sanctions and Costs and Attorney's Fees Under RCW 4.84.185 against Mr. Debely when Mr. Debely lacked standing, presented no evidence to support his claims, and dismissed his claims during trial.

III. STATEMENT OF THE CASE

This is a partition case involving the distribution of real property to three (3) siblings following the death of their father, George Delavergne. (CP 220). Mr. Delavergne quit claimed one-third interests in the Property to his three (3) daughters—Diane Rupert, Ellen Campion, and Denise Debely. (CP 221). It is undisputed that Ms. Rupert and Ms. Campion quit claimed a life estate in the

Property back to Mr. Delavergne shortly thereafter. (CP 221). It is undisputed that Diane Rupert and Ellen Campion were both entitled to a one-third interest in the Property. (CP 221). It is disputed if the remaining one-third interest in the Property should be distributed to the Estate of Denise Debely or if it should be distributed to Ms. Debely's husband and presumptive heir, Fletcher Debely.[1] (CP 209).

It is undisputed that the Confirmation of Joinder was never prepared or filed in this case. (CP 367-371).

It is undisputed that the parties did not engage in alternative dispute resolution in this case. (CP 367-371).

The Motion to Intervene was filed on October 14, 2021, and it was denied on October 19, 2021. (CP 104 and 151) A Motion for Reconsideration was filed on October 20, 2021, and it was denied on October 22, 2021. (CP 152,191, and 222).

[1] Ms. Debely pre-deceased her father, probate was opened, and Ms. Campion was appointed as the personal representative. Probate remains open as of the filing of this brief. Mr. Delavergne's Estate filed a discretionary appeal after it was denied the right to intervene in the lawsuit. The Estate's appeal was unsuccessful.

Ms. Campion, who is a licensed relator, managed the Property and collected rent for the Property prior to the appointment of a receiver. (CP 223). Ms. Campion charged a management fee for her work and also paid for an appraisal of the Property so that it could be sold. (CP 223).

In her Answer and at trial, Ms. Campion requested CR 11 sanctions and her costs and attorney's fees under RCW 4.84.185 against Mr. Debely for bringing a frivolous counterclaim against Ms. Campion for payment of back rent when Ms. Campion did not have a right to collect rent because of the life tenancy. (CP 85 and VTP 21). Additionally, Ms. Campion argued that any such claims would have been barred by the three (3) year statute of limitation. (VTP 21). At trial, the Superior Court ruled that Ms. Campion, Ms. Rupert, and Mr. Debely each had a one-third interest in the Property, apportioned expenses and income from the Property to the three (3) siblings, denied Ms. Campion's request for sanctions and attorney's fees,

and awarded Ms. Rupert her statutory costs and fees as the prevailing party. (CP 220-227). This appeal follows.

A. Factual Background.

On September 11, 2009, Mr. Delavergne executed a quit claim deed and granted a one-third interest to each of his three (3) daughters—Ms. Rupert, Ms. Campion, and Ms. Debely. (CP 220). On September 17, 2009, Ms. Rupert and Ms. Campion executed a quit claim deed and granted a life estate back to Mr. Delavergne. (CP 221).

On April 20, 2017 Ms. Debely died and Ms. Campion commenced probate proceedings on November 6, 2018. (CP 221-222). Ms. Campion was appointed as the personal representative on November 14, 2018. (CP 222). The probate remains open.

On April 20, 2020, Mr. Delavergne died. (CP 222). Ms. Campion assisted in the management of the Property following his death and collected a total of $8,400.00 in rent. (CP 223). Ms. Campion also charged a $100.00 per month management fee. (CP 223). Ms. Campion used the rent payments to pay taxes on the Property, sewer bills,

and insurance. (CP 223). Ms. Campion also had an appraisal performed on the Property for $600.00. (CP 223). Ms. Campion used the rent payments to pay the taxes on the Property in the amount of $5,272.60, to pay the sewer bill in the amount of $318.00, and to pay insurance for the Property in the amount of $1,533.11. (CP 223).

Two (2) receivers were appointed by the Superior Court to manage the Property—Martin Burns and Steven Freeborn. (CP 223). Mr. Burns was removed as the receiver on April 20, 2021 for mismanagement and failed to collect any rent from the tenants of the Property. (CP 223). Mr. Freeborn was appointed as receiver on the same day. (CP 223). Mr. Freeborn also failed to collect any rent from the tenants of the Property. (CP 359-360).

At trial, Ms. Rupert and Mr. Debely stipulated that Ms. Campion had collected $8,400.00 in rent and that this was all of the rent generated by the Property. (CP 224). Ms. Rupert and Mr. Debely also stipulated to the following expenses being deducted from that rent: $318.00 for sewer

costs, $3,669.15 in pro-rated taxes, and $1,522.11 in insurance costs. (CP 224).

Following trial, the Superior Court ruled that Ms. Campion, Ms. Rupert, and Mr. Debely each had a one-third interest in the Property, Ms. Campion was not entitled to deduct a management or appraisal fee, pro-rated the taxes that could be deducted based upon the date of Mr. Delavergne's death, and allowed the deduction for insurance payments. (CP 225-226). This resulted in a net rent of $2,890.74. (CP 226). However, Ms. Campion, because of the deductions she had already made, only remitted $857.52 to Mr. Freeborn. (VTP 81). As a result, the net rent was distributed to the three (3) siblings and Ms. Campion was ordered to pay the received an additional $2,033.22 to be distributed to Ms. Rupert and Mr. Debely. (CP 226).

IV. ARGUMENT

A. Standard of Review.

The standard of review for issues of fact, following the bench trial, is substantial evidence. "We review a trial

court's decision following a bench trial to determine whether challenged findings are supported by substantial evidence in the record and whether the findings support the conclusions of law. *Herring v. Pelayo*, 198 Wash. App. 828, 832-33, 397 P.3d 125 (2017) (*citing Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wash.2d 873, 879-80, 73 P.2d 369 (2003)). "Questions of law and conclusions of law are reviewed de novo." *Sunnyside*, 149 Wash. 2d at 880 (*citing Veach v. Culp*, 92 Wash.2d 570, 573, 599 P.2d 526 (1979)).

B. Trial Cannot Proceed Until the Mandatory Confirmation of Joinder Is Filed.

Pierce County Local Rule 19(c) mandates that the Confirmation of Joinder be filed as set forth in the case schedule: "the plaintiff **shall**, after conferring with all other attorneys or any self-represented party . . . file . . . a report entitled Confirmation of Joinder of Parties, Claims, and Defenses". (Emphasis added). The Confirmation of Joinder was required to be filed by February 5, 2021. It is undisputed that it was not filed by Ms. Rupert.

PCLR 19(c) contains mandatory language and those rules do not allow the Superior Court to ignore the Court Rules. "[The Washington State Supreme Court] interprets court rules as though they were drafted by the legislature." *State v. George*, 160 Wash. 2d 727, 735, 158 P.3d 1169 (2007) (*citing State v. Greenwood*, 120 Wash.2d 585, 592, 845 P.2d 971 (1993)). "As with statutes, "[The Washington State Supreme Court] gives effect to the plain language of a court rule, as discerned by reading the rule in its entirety and harmonizing all of its provisions." *Id.* The Superior Court's decision is reviewed de novo. *Malted Mousse, Inc. v. Steinmetz*, 150 Wash. 2d 518, 525, 79 P.3d 1154 (2003), as corrected on denial of reconsideration (Mar. 11, 2004) (*citing Wiley v. Rehak*, 143 Wash.2d 339, 343, 20 P.3d 404 (2001)).

The plain language of PCLR 19(c) makes clear that filing the Confirmation of Joinder is a mandatory obligation placed upon the plaintiff—Ms. Rupert. The term "shall" is presumptively mandatory and nothing in the text of PCLR 19(c) exists to overcome that

presumption. *State v. Krall*, 125 Wash. 2d 146, 149, 881 P.2d 1040 (1994). The Superior Court violated the plain meaning and text of the rule by allowing the trial to proceed without confirming that all of the proper parties had been joined. The Court of Appeals should reverse the Superior Court and require that Ms. Rupert confer with all of the parties to confirm that the proper parties were named.

It should be noted that this is not meanly a technical or procedural argument. The Confirmation of Joinder was required to be filed February 5, 2021. If Ms. Rupert's counsel would have actually followed PCLR 19(c) and if the Court would have required compliance, the Mr. Delavergne's Estate would have been joined as a party eight (8) months before trial. Simple compliance would have eliminated the vast majority of the issues at trial and likely would have resulted in settlement. The Court Rules are carefully crafted and are designed to accomplish specific goals. PCLR 19(c) is designed to make certain that the proper parties are named. It was error for the

Superior Court to ignore its own rules and, as a result, all of the parties in this case and Mr. Delavergne's Estate suffered substantial prejudice. Reviewing the Superior Court's decision de novo, this Court should reverse the Superior Court and require that Ms. Rupert confer with all of the parties to confirm that the proper parties were named.

C. Trial Cannot Proceed Until Alternative Dispute Resolution Takes Place.

In addition to failing to follow PCLR 19(c), the Superior Court also failed to enforce PCLR 16(c)(1), which mandates that some form of alternative dispute resolution be accomplished at least thirty (30) days before trial: "At least 30 days prior to trial the parties **shall** each submit a certification or declaration that they have participated in one or more types of ADR . . .". (Emphasis added). The deadline for that certification was September 10, 2021. It is undisputed that the parties failed to file that certification and it is also undisputed that alternative dispute resolution was not accomplished in this case.

As with PCLR 19(c), PCLR 16(c)(1) contains mandatory language and those rules do not allow the Superior Court to ignore the Court Rules. "[The Washington State Supreme Court] interprets court rules as though they were drafted by the legislature." *State v. George*, 160 Wash. 2d 727, 735, 158 P.3d 1169 (2007) (*citing State v. Greenwood*, 120 Wash.2d 585, 592, 845 P.2d 971 (1993)). "As with statutes, "[The Washington State Supreme Court] gives effect to the plain language of a court rule, as discerned by reading the rule in its entirety and harmonizing all of its provisions." *Id.* The Superior Court's decision is reviewed de novo. *Malted Mousse, Inc. v. Steinmetz*, 150 Wash. 2d 518, 525, 79 P.3d 1154 (2003), as corrected on denial of reconsideration (Mar. 11, 2004) (*citing Wiley v. Rehak*, 143 Wash.2d 339, 343, 20 P.3d 404 (2001)).

The plain language of PCLR 16(c)(1) makes clear that alternative dispute resolution is mandatory. The term "shall" is presumptively mandatory and nothing in the text of PCLR 16(c)(1) exists to overcome that presumption.

State v. Krall, 125 Wash. 2d 146, 149, 881 P.2d 1040 (1994). The Superior Court violated the plain meaning and text of the rule by allowing the trial to proceed without requiring alternative dispute resolution. The Court of Appeals should reverse the Superior Court and require that the parties engage in alternative dispute resolution.

Again, this is not a technical argument that Ms. Campion is attempting to rely upon. This is a mandatory requirement and it is mandatory for good reason—alternative dispute resolution works. The Court of Appeals should make clear to all Superior Court Judges in Washington that they cannot merely pick and chose which rules they will and will not follow. This violates due process and places all parties into judicial limbo, resulting in greatly increased costs, uncertainty, and unnecessary trials. This Court should reverse the Superior Court and require that the parties engage in alternative dispute resolution.

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D. The Estate Is a Necessary Party and Should Have Been Permitted to Intervene.

Ms. Campion recognizes that this Court has already denied Mr. Delavergne's Estate's request for discretionary review. Based upon the issues presented by the failure to follow PCLR 16(c)(1) and PCLR 19(c), requests that if this appeal is successful, Mr. Delavergne's Estate be permitted to join the reopened case as a party.

E. The Court Erred in Calculating Damages.

The Superior Court heard extensive testimony regarding the calculation of the costs incurred in this matter. It is undisputed that Mr. Delavergne was solely responsible for the collection of rents related to the Property from September 16, 2009 until his death on April 20, 2020. There was no evidence or testimony before the Superior Court showing that Ms. Campion collected any funds on behalf of her father until after he passed away.

It is undisputed that following Mr. Delavergne's death, Ms. Campion began collecting cash rent payments from the tenants who were living at the Property. She collected rent six (6) times—from May 2020 until October

2020. In total, she collected $8,400.00. Ms. Campion initially held those funds, unsure of how she should dispose of them. Wanting to protect the Property, Ms. Campion paid $5,272.60 in property taxes, $318.00 in sewer bills, $600.00 for an appraisal, and $1,522.11 in insurance premiums. Ms. Campion also billed $100.00 per month as a management fee for a total of $600.00. Ms. Campion initially made all of these payments out of her own pocket, but after making the payments, Ms. Campion reimbursed herself with the rent she had received. After the receiver was appointed, Ms. Campion made an additional payment of $857.52 to the receiver.

While it may have been preferrable for Ms. Campion to work with her sister and her deceased sister's husband to coordinate the collection of rent and the management of expenses, Ms. Campion did an exemplary job and protected the Property. Ms. Campion collected all of the rent without an issue, paid all of the taxes and bills for the Property, and made certain that the Property was fully insured. This may seem like a modest

accomplishment and the $100.00 per month management fee may sound high, but Ms. Campion's management of the Property should be measured against the accomplishments of the two professional receivers appointed in this case. Neither of the two receivers were able to successfully collect any rent from the tenants—Ms. Campion collected rent for six (6) months without issue.[2] As a result of the ineptitude of the two receivers, one of whom had to be removed for failure to meet his obligations, at least $14,000.00 was lost. Additionally, the "fees" charged by the receivers are far higher than the $100.00 per month management fee that Ms. Campion charged. In short, under Ms. Campion's management, all of the bills and expenses were paid and all of the rent that was due was timely collected.

The Superior Court erred in its calculation of damages. In addition to rejecting the management fee and refusing to reimburse Ms. Campion for the appraisal costs, the Superior Court pro-rated the tax payments based upon

[2] It should be noted that the COVID-19 pandemic was present during this entire period.

the date of Mr. Delavergne's death—and required that Ms. Campion personally pay the remaining tax amount. There is no basis for this decision and fails to meet the substantial evidence standard. As the owners of the Property, the parties are ultimately responsible for all of the costs associated with the Property—even if some of those debts were incurred before they took ownership. If those expenses were not paid, creditors would place liens to foreclose on the Property. All of the actual costs incurred should have been borne equally by the parties and Ms. Rupert and Mr. Debely can then bring additional claims against the Mr. Delavergne's Estate for contribution.[3] Ms. Campion is not, in her individual capacity, responsible for any of those costs and she should not have been forced to pay them when she incurred those costs to preserve the Property for all of the parties.

This Court should find that Ms. Campion acted appropriately under the difficult circumstances and should order that each Party pay one third of the negative net total

[3] If the Superior Court would have required the mandatory Confirmation of Joinder to be prepared, Mr. Delavergne's Estate would also have been named as a necessary party.

or $256.64.[4] As Ms. Campion has already paid the entire amount, Ms. Rupert and Mr. Debely should each pay this amount to Ms. Campion.

F. Mr. Debely's Counterclaim Was Frivolous and Ms. Campion Is Entitled to CR 11 Sanctions and Costs and Attorney's Fees.

On October 22, 2020, Mr. Debely filed his Cross-Claim against Ms. Campion seeking "$57,056.00, or such other amount as the court may determine, representing rent collected from tenants on the Property and retained by ELLEN CAMPION from September 11, 2009 to the present time." In his trial brief, Mr. Debely made clear that he was still pursuing this claim—using identical language from the Cross-Claim. In opening argument, Mr. Debely, through counsel, reiterated his intent to seek these damages from Ms. Campion. As a result of these representations, Ms. Campion was forced to file an Answer, respond to extensive discovery both individually and with the assistance of counsel, and to prepare a defense at trial. Ms. Campion consistently maintained in

[4] The total cost was negative $769.91.

her Answer, in discovery, in communications with counsel, and in trial that there was no basis for any of Mr. Debely's claims and that she would be seeking CR 11 sanctions and costs and attorney's fees incurred: "The claims are false and without merit and should be dismissed. Sanctions should be awarded for all costs incurred in defending the baseless claims."

However, in the middle of trial, after failing to even appear in Court, Mr. Debely, again through counsel as he was not present, decided he was no longer going to pursue these completely meritless claims. As a result, Ms. Campion sought the relief requested in her Answer—CR 11 sanctions and attorney's fees and costs under RCW 4.84.185.

An action is frivolous or advanced without reasonable cause if the non-prevailing party's position cannot be supported by a rational argument of the law or facts of the case. *Forster v. Pierce County*, 99 Wn. App. 168, 991 P.2d 687, review denied, 141 Wn.2d 1010 (2000). RCW 4.84.185 authorizes the imposition of an

award against a "non-prevailing party" of attorney fees and costs incurred by the prevailing party in opposing any action, claim, or defense that is frivolous and advanced without reasonable cause. *Havsy v. Flynn*, 88 Wn. App. 514, 945 P.2d 221 (1997).

The Superior Court's denial of the request is reviewed for an abuse of discretion. *Dave Johnson Ins., Inc. v. Wright*, 167 Wash. App. 758, 786, 275 P.3d 339 (2012). Here, the Superior Court abused its discretion because there was no rational argument to support Mr. Debely's Counterclaims.

Mr. Debely's Counterclaims were frivolous for two (2) primary reasons. First, until the death of Mr. Delavergne, Ms. Campion had no ownership interest in the Property and had no right to collect any rents or incomes derived from the Property—Mr. Delavergne had a life estate that granted him control of the Property. Therefore, Mr. Debely's Counterclaims were directed against the wrong party. Here, there was no possible means of successfully bringing Mr. Debely's claims against Ms.

Campion—Ms. Campion was the wrong party and could not be sued. Mr. Debely may have claims against the Mr. Delavergne's Estate, but regardless of Ms. Campion's conduct, she cannot be sued by Mr. Debely failing to pay him one third of the profits from the Property—Ms. Campion gave up her property interested in the Property when she gave her father a life estate.

Second, Mr. Debely's Counterclaims were barred by the statute of limitations—which is three (3) years. *See* RCW 4.16.080(2). Mr. Debely asserted claims going back to 2009. Assuming, arguendo, that Ms. Campion was the owner of the Property, which all of the parties agree she was not, Mr. Debely would only have been able to assert claims going back to 2017. All prior claims are clearly barred by the statute of limitations. And, again, Ms. Campion was not the owner of the Property during this period so even if the Counterclaim was timely, which it was not, it would still have been barred and should be considered frivolous.

A simple review of basic legal principles would have made clear that these claims were completely meritless—yet Ms. Campion was still forced to spending thousands of dollars to defend against them. This Court should award Ms. Campion the reasonable costs and attorney's fees incurred in defending against Mr. Debely's meritless claims.

G. This Court Should Award Ms. Campion's Costs and Attorney's Fees on Appeal.

Ms. Campion requests that the Court award her reasonable attorney's fees and costs pursuant to RAP 18.1. As set forth above, pursuant to CR 11 and RCW 4.84.185, Ms. Campion is entitled to her reasonable attorney's fees and costs for this appeal.

V. CONCLUSION

The Superior Court failed to follow the mandatory court rules and, as a result, the correct parties were not included and Ms. Campion was forced to spend thousands of dollars to defend against frivolous claims. The Superior Court errored in its calculation of damages and in denying Ms. Campion's request for attorney's fees and costs when

Mr. Debely's Counterclaims were frivolous. Ms. Campion respectfully requests that this Court order the Superior Court to follow the mandatory court rules, allow the Estate to be added as a party based upon those mandatory court rules, award the requested damages, and grant Ms. Campion's reasonable attorney's fees and costs.

RESPECTFULLY SUBMITTED this 26th day of July 2022.

CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b), I hereby certify that this brief contains 3,829 words exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, and signature blocks.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed or caused to be mailed a copy of the foregoing *Brief Of Appellant Ellen Campion*, via U.S. mail, postage prepaid, on the 26th day of July 2022, to the following counsel of record at the following addresses:

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